The Litigator

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The Chair's Comments

L. Cooper Harrell

By L. Cooper Harrell

As I sat down on a chilly winter morning to write these words, I couldn't help but notice the layer of snow and ice covering most everything in sight. Although it's starting to melt, it can't disappear fast enough for me! The pale, gray sky and the briny mess on the ground are constant reminders of how dreary winter can be. Unless you love snow (and, clearly, I do not), it can be hard to muster enthusiasm this time of year. Thankfully, this is "busy season" for the Litigation Section, and we have lots of exciting projects underway. I have highlighted just a few of them here; you can, of course, learn more about these projects, and others, on the Bar Association's website, ***www.ncbar.org***.

The Litigation Section Annual Meeting and CLE

The planners and speakers for the Section's February CLE have been hard at work since well before the holidays. *E3: E-Discovery, Experts and Ethics*, scheduled for Friday, February 12, 2016 at the Bar Center in Cary, promises to be an outstanding program. It is approved for 6 hours of CLE credit, including one hour of ethics credit. The first segment focuses on e-discovery, with analysis of the requirements under the Rules of Civil Procedure as well as problem solving (and, better yet, problem prevention) ideas from a digital forensics expert. After a short break, the second segment focuses on tips and common traps related to retained experts, beginning with the process of retaining an expert, all the way through presentation of the expert's testimony at trial. Following a lunch break, the third segment focuses on business valuation experts, which can be helpful in many types of cases. This segment will be more interactive, with sample direct and cross examinations of a business valuator, followed by a panel discussion to help identify what worked well and what did not. The fourth segment features two breakout groups, allowing attendees to choose which session most

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The Fair Labor Standards Act Statute of Limitations Limits Employer Liability: Except When It Doesn't

By Grant B. Osborne

"Hard cases, it has frequently been observed, are apt to introduce bad law." –Judge Robert Rolfe, Winterbottom v. Wright, 1842.

"For the want of a nail . . . the Kingdom was lost." –Unknown

In a decision that has received relatively little attention, the United States Court of Appeals for the Fourth Circuit held in **Cruz v. Maypa**, 773 F.3d 138 (4th Cir. 2014), that an employer covered by the Fair Labor Standards Act of 1938 ("FLSA") who fails to maintain a posted notice explaining to covered employees their statutory right to minimum wages and premium overtime pay may, as a result, forfeit the right to assert an affirmative defense based upon the FLSA's statute of limitations ("SOL").

The facts of **Cruz** are admittedly extraordinary, but the holding invites an argument that an employer whose *only* transgression is the failure to post or maintain the required notice has lost the right to the defense that an FLSA claim, regardless of when the claim is filed, is untimely and therefore barred by law. That an SOL can be "tolled" based on equitable principles is hardly news. Many litigators, however, may be surprised to learn that a defense as elementary (and occasionally critical) as one based on an SOL

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Winning Quickly: Defeating Contract Claims With a Motion to Dismiss (Part I of II)

By Scott A. Miskimon and Lauren H. Bradley

In Charlotte Motor **Speedway, LLC v. County of Cabarrus**, 230 N.C. App. 1, 748 S.E.2d 171 (2013), *disc. rev. improvidently allowed*, 367 N.C. 533, 766 S.E.2d 340 (2014), the North Carolina Court of Appeals affirmed the dismissal of a breach of contract claim pursuant to Rule 12(b)(6). The plaintiffs alleged that they and the defendant municipalities entered into a contract in which the defendants would pay for $80 million worth of infrastructure improvements in connection with the plaintiffs' existing speedway and a planned drag strip. The Court of Appeals' decision may surprise some. How could such a sizeable claim asserted by well-funded plaintiffs be terminated at such an early stage? And just how hard is it to plead a claim for breach of contract?

More often than not, if a contract claim fails, it will be disposed of at summary judgment. Discovery may allow the defects in the contract claim to be exposed through the production of documents, interrogatories, and cross-examination at deposition. But by the time a motion for summary judgment is heard, the expense and distraction of the discovery process can be significant. A quicker and less costly way to defeat a defective contract claim—as demonstrated by the **Charlotte Motor Speedway** case—is through a motion to dismiss for failure to state a claim for relief. Although a Rule 12(b)(6) motion is not commonly used to eliminate contract claims, North Carolina's courts have been receptive to a well-conceived and well-argued motion to dismiss where the pleading fails to adequately allege a valid contract claim, asserts a contract claim that flies in the face of a written agreement, or reveals some insurmountable barrier to recovery such as the statute of limitations.

Recent years have seen an increase in the number of appellate decisions affirming Rule 12(b)(6) dismissals of contract claims. Our analysis shows that North Carolina's appellate courts have approved the dismissal of contract claims six times during the 1970s; fourteen times during the 1980s; nine times during the 1990s; seventeen times during the 2000s; and twenty times between 2010 and 2014. This demonstrates a significant increase in the number of dismissals since the turn of the century. There were a total of 29 dismissals affirmed on appeal in the last 30 years of the twentieth century, and 37 dismissals affirmed during the first fifteen years of the twenty-first century. Comparing those two time periods, there has been a 156% increase in the number of appellate opinions affirming dismissals of contract claims.

Almost all of the referenced appellate decisions were rendered by the North Carolina Court of Appeals. Out of the 66 cases cited and discussed in this two-part article in which the dismissal of a contract claim was affirmed by an appellate court, only six cases were decided by the North Carolina Supreme Court with a written opinion or *per curiam* decision, and in those cases, both the Supreme Court and the Court of Appeals affirmed the dismissal.

Another interesting trend emerges regarding unpublished opinions from the Court of Appeals, which the appellate rules first authorized in 1975. Of the 56 cases decided by the Court of Appeals since 1975 involving dismissals of contract claims, eleven were decided in unpublished opinions. Six of those unpublished opinions were issued in 2013 and 2014, and two of the three opinions from 2014 are unpublished. This demonstrates that historically the Court of Appeals affirmed dismissals of contract claims in published opinions but lately has affirmed such dismissals by unpublished opinions. That many of the most recent cases on this topic are unpublished may indicate that granting a motion to dismiss a contract claim is being seen as not involving "new legal principles" and is instead considered a routine ruling based on well-established law.

In 2014, the North Carolina General Assembly enacted legislation giving an appellant a direct right of appeal to the North Carolina Supreme Court of a decision rendered by our state's Business Court. N.C.G.S. § 7A-27(a)(2) (applicable to business court cases designated on or after October 1, 2014). It will be interesting to see whether those decisions, which often involve complex contract cases, result in dismissals of contract claims and whether the Supreme Court affirms or reverses those dismissals. **Charlotte Motor Speedway** is the only recent case in which the Supreme Court has allowed discretionary review. This was temporary, however, because the Supreme Court subsequently determined that discretionary review in **Charlotte Motor Speedway** was improvidently granted. Otherwise, the Supreme Court has dismissed or denied the petition for discretionary review or petition for certiorari in more than three-quarters of the cases in which higher appellate review was sought.

It is not clear whether the increase in affirmed dismissals seen to date is due to more contract lawsuits being filed; incautious investigation, analysis and drafting among the bar; more aggressive defensive litigation tactics leading to successful challenges; the possibility that North Carolina's judiciary is simply now more receptive to a motion to dismiss a contract claim than in years past; or some combination of these factors. Regardless of the reason, the fact that 12(b)(6) motions have been increasingly successful suggests that plaintiff's counsel drafting a breach of contract claim should be wary of pleading pitfalls. Defense counsel should also take a hard look at whether a contract claim is fatally defective due to pleading errors or due to defects in the contract itself.

Before examining the substance of motions to dismiss, it should be noted that this article is intended for counsel for both plaintiffs and defendants, since either party may benefit from testing the sufficiency of a pleading in a contract case. For example, a plaintiff may assert a Rule 12(b)(6) motion to defeat an insufficient contract counterclaim that a defendant has filed against it. *See, e.g.*, **Bob Timberlake Collection, Inc. v. Edwards**, 176 N.C. App. 33,

43, 626 S.E.2d 315, 323-24 (2006). Likewise, if a defendant asserts a contract right as an affirmative defense, the plaintiff may employ a Rule 12(f) motion to strike the affirmative defense. These two motions are essentially the same as both test the sufficiency of a pleading. **First-Citizens Bank & Trust Co. v. Akelaitis**, 25 N.C. App. 522, 525, 214 S.E.2d 281, 284 (1975). An affirmative defense based on a defective contract is thus subject to being stricken from the case. *See id.* Therefore, in cases involving counterclaims or affirmative defenses based on defective contract-based theories, plaintiffs also have the horsepower needed to achieve a "victory lap" at the pleading stage.

The Starting Line: Essential Elements and Grounds for Dismissal

The starting line for a motion to dismiss are the grounds for dismissal under Rule 12(b)(6) and the essential elements for a claim for breach of contract. A complaint should be dismissed when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." **Wood v. Guilford County**, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

The essential elements of a breach of contract claim are (1) a valid contract; (2) a breach; (3) proximate cause; and (4) damage. **McLamb v. T.P., Inc.**, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005), *disc. rev. denied*, 360 N.C. 290 (2006) (plaintiff must allege a valid contract and a breach of its terms); **Perkins v. Langdon**, 237 N.C. 159, 169-71, 74 S.E.2d 634, 643-44 (1953) (proximate cause and damage as essential element of proof); **Mosley & Mosley Builders, Inc. v. Landin, Ltd.**, 97 N.C. App. 511, 523, 389 S.E.2d 576, 583 (1990) (same). For pleading purposes, the complaint must allege the existence of a contract between the plaintiff and defendant, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to plaintiff from such breach. **RGK, Inc. v. United States Fid. & Guar. Co.**, 292 N.C. 668, 675, 235 S.E.2d 334, 238 (1977); **Claggett v. Wake Forest Univ.**, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997); *see* **Vogel v. Health Sciences Found., Inc.**, 2013 N.C. App. LEXIS 1287, at *13-14, 753 S.E.2d 742 (Dec. 3, 2013) (unpublished) (affirming dismissal of plaintiff's breach of contract claim where he did not specify which provisions of the contract the defendant breached); **Stony Point Hardware & Gen. Store, Inc. v. Peoples Bank**, 2011 N.C. App. LEXIS 1782, at *20, 214 N.C. App. 563, 714 S.E.2d 866 (Aug. 16, 2011) (unpublished) (same).

A defendant need only negate *one* essential element of a claim in order for the claim to be dismissed. *See, e.g.,* **S.N.R. Management Corp. v. Danube Partners, 141, LLC**, 189 N.C. App. 601, 615, 659 S.E.2d 442, 452-53 (2008) (affirming dismissal of tortious interference with contract claim due to insufficient pleading as to one of the claim's essential elements); **Holloman v. Aiken**, 193 N.C. App. 484, 500, 668 S.E.2d 579, 590 (2008) (same).

On a Rule 12(b)(6) motion, the court should treat the allegations of the complaint as true. **Id.** However, an allegation that amounts to no more than a conclusion of law or unwarranted deduction of fact is not presumed to be true. *See, e.g.*, **Sutton v. Duke**, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Because legal conclusions do not merit favored treatment, an allegation that a valid contract exists is merely a legal conclusion that is not entitled to a presumption of truth. **Charlotte Motor Speedway**, 230 N.C. App. at 6, 748 S.E.2d at 175.

Start Your Engines: Contract Invalidity

A contract may be found to be invalid for many reasons. Lack of mutual assent will defeat a contract claim, either because an offer was not accepted, the terms agreed upon were too indefinite, material terms were left open for future agreement, or a condition precedent to contract formation failed to occur. John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law*, § 2-12 at 76, § 2-29 at 131-33, § 2-31 at 146-49, § 2-6 at 65-67 (Lexis, 2001). Lack of consideration will also prevent the formation of a valid contract. *Id.* § 3-2 at 162-63.

Where the contract at issue is in writing, other issues can arise. Dismissal is appropriate if the allegations are either refuted by the contract's terms or if the written agreement discloses a defect that prevents the formation of a contract. If the problem is a pleading defect, that can be corrected if the court dismisses the complaint without prejudice or grants the plaintiff leave to amend the complaint. If the problem is that the written agreement is defective on its face, however, no amount of artful pleading can save the contract claim.

Lack of Mutual Assent

Charlotte Motor Speedway offers a good example of using a motion to dismiss to quickly dispose of a contract claim where the purported contract fails due to a lack of mutual assent. In that case, the plaintiffs attached to the complaint the defendants' letter and alleged that it was a valid contract that obligated the defendants to spend $80,000,000 in infrastructure improvements. In their letter, however, the defendants wrote, "We understand that all parties anticipate that the $80,000,000 will be formalized in an agreement that will also provide an outline of a schedule to prioritize projects and to identify the investment that [plaintiff] SMI plans to make through the construction of the drag strip and improvements to Lowe's Motor Speedway." **Charlotte Motor Speedway**, 230 N. C. App. at 4, 748 S.E.2d at 174. The Court of Appeals ruled that this language showed that there was no mutual assent as to material terms and that the parties instead left open terms to be decided by a future agreement. *Id.* at 7-8, 748 S.E.2d at 176-77. Consequently, the defendants' letter was not a binding contract but an invalid agreement to agree. *Id.* The plaintiffs' claim also failed due to indefiniteness because the letter did not set forth any specific obligations for the plaintiffs and did not provide a deadline for when the defendants would be required to provide financing. *Id.* at 8, 748 S.E.2d at 177.

Similarly, in **Hammers v. Lowe's Companies**, 48 N.C. App. 150, 153, 268 S.E.2d 257, 259 (1980), it was evident that the parties' negotiations never culminated in a contract to build a house. Although there were "extended negotiations," no final plans or price resulted from the negotiations. *Id.*; **see also Woods v. Sentry Ins.**, 2008 N.C. App. LEXIS 1773, at *16-17, 193 N.C. App. 248, 666 S.E.2d 891 (Oct. 7, 2008) (unpublished) (holding that no settlement contract had been formed where parties did not reach an agreement on the method of disbursing the settlement funds and affirming dismissal of breach of contract claim).

Offer and acceptance are fundamental requirements for a valid contract. Where a plaintiff sues for specific performance for breach of

an option contract, dismissal is proper where the complaint discloses that the plaintiff failed to exercise the option before the expiration of the option period. **Bediz v. Capital Facilities Found., Inc.**, 2014 N.C. App. LEXIS 1134, at *6, 767 S.E.2d 149 (2014) (unpublished). In **Bediz**, the plaintiff argued that the complaint should not be dismissed because the parties continued negotiating the option after the option expired. **Bediz**, 2014 N.C. App. LEXIS 1134, at *7. The Court correctly refuted that argument: Because time is of the essence in an option by *operation of law*, missing the deadline to exercise the option—even by one day—was fatal to the claim. *See id.* at *6; Hutson & Miskimon, *North Carolina Contract Law*, § 2-27-2 at 111.

As elementary as it seems, failure to sign the contract can also justify a dismissal. In **Burgin v. Owen**, 181 N.C. App. 511, 640 S.E.2d 427 (2007), the Court of Appeals affirmed the dismissal of a claim for specific performance of a real estate contract where the land was owned by a husband and wife, and although the husband signed the contract, the wife did not. By statute, both spouses' signatures, or written authorization from one spouse to the other, are required to convey tenancy by the entireties property. *Id.* at 512-13, 640 S.E.2d at 429 (citing N.C.G. S. § 39-13.6(a)).

Less than two months later, in **Parker v. Glosson**, 182 N.C. App. 229, 641 S.E.2d 735 (2007), the Court of Appeals relied in part on **Burgin** and held that the failure of a named party to the contract to sign it meant that no contract had been formed. *Id.* at 233, 641 S.E.2d at 738. Significantly, the agreement stated, "This [a]greement shall *become an enforceable contract* when a *fully executed* copy has been communicated to both parties." *Id.* (alteration in original). The written agreement thus made it clear that full execution was necessary for the formation of a contract, and because the defendant did not sign it, no contract was formed and dismissal was warranted. *Id.* at 234, 641 S.E.2d at 738-39.

Lack of mutual assent can also lead to the dismissal of a contract-related tort claim. In **Crowell v. Davis**, 2013 N.C. App. LEXIS 325, 226 N.C. App. 431, 741 S.E.2d 511 (April 2, 2013) (unpublished), the Court of Appeals affirmed the dismissal of the plaintiff's claim for tortious interference with contract. Because there was no mutual assent to a definitive agreement with an employer, the plaintiff had no contract with which the defendant could have interfered. *Id.* at *15-17.

Conditions Precedent to Assent: Lack of a Pre-Audit Certificate

Ordinarily, counsel drafting a complaint will include a boilerplate allegation that all conditions precedent to recovery have occurred, been satisfied, and/or waived. In most cases this will pass muster and will not be grounds for dismissal. *See* **Beachboard v. Southern Ry. Co.**, 16 N.C. App. 671, 681, 193 S.E.2d 577, 584 (1972) ("[I]t is sufficient to aver generally that all conditions precedent have been performed and have occurred") (citation and internal quotation marks omitted). However, where the contract sued upon has a specific condition that must be met in order for the plaintiff to recover, it will be essential to include allegations that specify with particularity not only that the condition was met, but when and how it was met.

A condition precedent may be expressly stated in the contract. Or it may occur by reason of a statute. The most frequently litigated issue of a statutory condition precedent to contract validity involves contracts entered into with a municipality and the need for a pre-audit certificate as required by N.C.G.S. § 159-28(a). The pre-audit certificate confirms that the municipality has the funds available to pay obligations of the contract during the current fiscal year. Hutson & Miskimon, *North Carolina Contract Law*, § 2-6-1 at 27 (2014 Cum. Supp.).

Without a pre-audit certificate signed by the municipality's finance officer, the contract with the municipality is void, the plaintiff is without a remedy, and the plaintiff's case must be dismissed. *See, e.g.*, **Howard v. County of Durham**, 227 N.C. App. 46, 54-55, 748 S.E.2d 1, 6 (2013); **Executive Med. Transp., Inc. v. Jones County Dep't. of Soc. Servs.**, 223 N.C. App. 242, 243-44, 735 S.E.2d 352, 352-53 (2012); **M Series Rebuild, LLC v. Town of Mount Pleasant**, 222 N.C. App. 59, 67-68, 730 S.E.2d 254, 260 (2012); **Transportation Servs. of N.C., Inc. v. Wake County Bd. of Educ.**, 198 N.C. App. 590, 591-92, 680 S.E.2d 223, 224 (2009); **Data Gen. Corp. v. County of Durham**, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247-48 (2001); **Cincinnati Thermal Spray, Inc. v. Pender County**, 101 N.C. App. 405, 407-08, 399 S.E.2d 758, 759 (1991).

Because of the statutory requirement for a pre-audit certificate, complaints alleging breach of contract with a municipality will be subject to greater scrutiny. The complaint must allege that the municipality issued a pre-audit certificate signed by its finance officer, and the better practice is to attach the pre-audit certificate to the complaint.

Lack of Consideration

Although contract claims are not often dismissed for lack of consideration, counsel should be alerted to this possibility. *See*, *e.g.*, **Charlotte Motor Speedway**, 230 N.C. App. at 9, 748 S.E.2d at 177 (affirming dismissal due to lack of consideration); **Turner v. Ayers**, 2014 N.C. App. LEXIS 758, at *6-7, 763 S.E.2d 340 (July 15, 2014) (unpublished) (affirming dismissal where the complaint did not indicate any consideration was given in return for the alleged oral modification of the written contract, and the unmodified contract's terms defeated plaintiff's claim); **McLamb**, 173 N.C. App. at 588, 619 S.E.2d at 580 (affirming dismissal of claim for breach of an option to purchase lots; no consideration existed where deposits were fully refundable at optionees' request); **Scott v. United Carolina Bank**, 130 N.C. App. 426, 429, 503 S.E.2d 149, 151-52 (1998) (affirming dismissal of contract claim where plaintiff did not allege mutuality of agreement); **Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co.**, 86 N.C. App. 540, 542, 358 S.E.2d 539, 540 (1987), *aff'd*, 322 N.C. 107, 366 S.E.2d 441 (1988) (per curiam) (affirming dismissal of plaintiff's complaint; defendant's promise to perform ductwork for a stated sum lacked consideration because plaintiff provided no benefit and incurred no detriment for defendant's promise); **Williams v. Hillhaven Corp.**, 91 N.C. App. 35, 42-43, 370 S.E.2d 423, 426-27 (1988) (affirming dismissal of claim for breach of purported contract of permanent or lifetime employment where at-will employee provided no "additional consideration over and above her general services and duties"); *cf.* **American Credit Co. v. Stuyvestant Ins. Co.**, 7 N.C. App. 663, 668, 173 S.E.2d 523, 526 (1970) (affirming the trial court's order vacating a default judgment against defendant insurer where there was no consideration for the insurer's promise to name plain-

tiff financing company as the loss payee on an insurance policy).

Charlotte Motor Speedway again provides a good example of lack of consideration justifying dismissal. While it appeared that the defendant county agreed in its letter to provide $80 million in financing, the plaintiffs incurred no detriment and conferred no benefit on the defendants in exchange for their promise of financing. **Charlotte Motor Speedway**, 230 N.C. App. at 8, 748 S.E.2d at 177. In short, the purported contract did not disclose a bargained-for exchange of promises and did not indicate that the plaintiffs were contractually obligated to do anything in return for the $80 million.

Allegations Contradicting the Written Contract

Dismissal is also appropriate when the plaintiff's allegations contradict the written contract, including when the plaintiff alleges terms that are not in the contract at all. Where a written contract is attached to the complaint as an exhibit and the contract contradicts the allegations of the complaint, absent allegations of a valid and enforceable oral modification, the written contract controls. *See* **Highland Paving Co. v. First Bank**, 227 N.C. App. 36, 41-42, 742 S.E.2d 287, 292 (2013); **Turner**, 2014 N.C. App. LEXIS 758, at *6-7.

In **Highland Paving**, the Court of Appeals affirmed the dismissal of the plaintiff's contract claim based on a contradiction between the allegations of the complaint and the terms of the contract. The plaintiff paving contractor had a contract with the defendants, a bank and a real estate developer, wherein the bank agreed to escrow the "proceeds" from any sales of real estate lots by the developer and distribute them to the plaintiff as payment for paving and grading work. **Highland Paving Co**., 227 N.C. App. at 37-38, 742 S.E.2d at 289-90. The plaintiff sued for breach of contract when the developer transferred several lots and the bank did not distribute any funds to the plaintiff. *Id.* at 38, 742 S.E.2d at 290. The Court of Appeals affirmed the trial court's order dismissing the claim because, although the plaintiff described the transfer of the lots as a "sale," the documents attached to the plaintiff's complaint revealed that the transfer of the lots was in satisfaction of a debt, which was not a sale and from which there were no "proceeds" to escrow or distribute to the plaintiff. *Id.* at 41-42, 742 S.E.2d at 292. Consequently, the court held that the plaintiff had no claim for breach of contract.

The Court of Appeals was demonstrably annoyed by the plaintiff's contract claim in **Lewis v. Salem Academy & College**, 23 N.C. App. 122, 208 S.E.2d 404 (1974). The plaintiff, a former professor, alleged that Salem College breached his employment agreement by forcing him into early retirement contrary to the alleged terms of the agreement and the Faculty Guide. *Id.* at 124, 208 S.E.2d at 405-06. The plaintiff's written contracts throughout his employment stated that the normal retirement age was 65, that employment beyond age 65 was at the discretion of the Board of Trustees on a year-to-year basis, and the plaintiff's employment in fact continued past 65 on a year-to-year basis with the Board's approval. *Id.* at 126-27, 208 S.E.2d at 407. The Court of Appeals found it "difficult to see how language could be more explicit" and affirmed the trial court's Rule 12(b)(6) dismissal of the claim. *Id.* at 127, 208 S.E.2d at 407.

Other cases have also been dismissed when the allegations in the complaint have conflicted with the terms of the contract. *See*, *e.g.*, **Grich v. Mantelco, LLC**, 228 N.C. App. 587, 590, 746 S.E.2d 316, 319 (2013) (affirming dismissal where plaintiff received $7,000 from defendants for property damage claim, and later signed a release in exchange for $38,000 "in hand paid"; terms of release defeated plaintiff's claim that $7,000 paid prior to the release did not count towards the $38,000 settlement payment); **Turner**, 2014 N.C. App. LEXIS 758, at *6-7 (affirming dismissal where complaint did not indicate any consideration given in return for alleged oral modification of written contract, and the unmodified contract's terms defeated plaintiff's claim seeking damages regarding post-closing repairs); **Schlieper v. Johnson**, 195 N.C. App. 257, 265, 672 S.E.2d 548, 553 (2009) (affirming dismissal of claim based on 2002 agreement where 2005 agreement stated that 2002 agreement was null and void); **Robertson v. Boyd**, 88 N.C. App. 437, 445, 363 S.E.2d 672, 677-78 (1988) (affirming dismissal of claim for breach of contract for the sale of house where house needed repairs due to termite infestation and contract required repairs prior to closing but not after closing unless agreed to in writing; plaintiffs' claim failed where they closed on house and accepted the deed knowing of the termite damage, and there was no written agreement requiring post-closing repairs); *see also* **Plummer v. Community Gen. Hosp. of Thomasville, Inc.**, 155 N.C. App. 574, 579, 573 S.E.2d 596, 599-600 (2002) (affirming dismissal of breach of contract claim where plaintiff doctor alleged defendant hospital failed to give notice and opportunity for a hearing; termination of doctor's medical group was not the functional equivalent of a termination of his medical privileges at the hospital, which would have entitled plaintiff to notice and hearing under hospital's bylaws).

Several cases involved terms that were not in the contract where the plaintiff improperly relied on an employee handbook for his claim. In **Guarascio v. New Hanover Health Network, Inc.**, 163 N.C. App. 160, 592 S.E.2d 612 (2004), the trial court's dismissal was affirmed on appeal where the plaintiff did not have a contract with the defendant and only conclusorily alleged that the employee handbook was a part of his employment contract. *Id.* at 165, 592 S.E.2d at 614; *see also* **Rucker v. First Union Nat'l Bank**, 98 N.C. App. 100, 102-03, 389 S.E.2d 622, 624-25 (1990) (trial court did not err in granting motion to dismiss breach of contract where employment manuals were not part of contract for employment and plaintiff was an at-will employee); **Privette v. Univ. of N.C. at Chapel Hill**, 96 N.C. App. 124, 132-33, 385 S.E.2d 185, 189 (1989) (breach of contract claim was correctly dismissed where plaintiff was an at-will employee and merely alleged he had an employment contract with UNC but failed to allege UNC's Personnel Guide was that contract, the terms of that purported contract, and failed to attach that supposed contract to his complaint); **Harris v. Duke Power Co.**, 83 N.C. App. 195, 199, 349 S.E.2d 394, 396 (1986), *aff'd*, 319 N.C. 627, 356 S.E.2d 357 (1987) (affirming dismissal where plaintiff alleged that employee handbook restricted defendant's ability to terminate plaintiff's but employment handbook did not contain such a restriction); **Mumford v. Hutton & Bourbonnais Co.**, 47 N.C. App. 440, 443, 267 S.E.2d 511, 513 (1980) (dismissal of breach of contract claim was proper when plaintiff alleged a three-year contract term but exhibit attached to complaint did not contain a definite term of employment, meaning plaintiff was an at-will employee).

In **Forbis v. Honeycutt**, 301 N.C. 699, 273 S.E.2d 240 (1981), the Supreme Court was called upon to decide whether a real estate listing agreement empowered the real estate agent to enter into a binding contract to convey real property. The Court ultimately answered that

question as "no." *Id.* at 701-02, 273 S.E.2d at 241-42. Consequently, the plaintiff buyers' claim for specific performance failed and was properly dismissed. Although the defendant sellers' real estate agent was in privity of contract with the sellers, the agent lacked authority under the listing agreement to enter into an enforceable contract to convey the property. *Id.* at 704-05, 273 S.E.2d at 243.

The lessons to be drawn from these cases is that counsel for both plaintiffs and defendants should carefully read the terms of the contract to identify any inconsistencies with the allegations of the plaintiff's complaint; a conflict between the complaint and the contract makes a contract claim ripe for dismissal.

In Part II of this article, we will examine other grounds for 12(b)(6) dismissal of contract claims, including the statute of limitations, lack of standing, and damage claims that are unavailable for a breach of contract. We will also discuss strategies that counsel should consider when prosecuting or defending a motion to dismiss.

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